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No. 79-661

In the Supreme Court of the United States

OCTOBER TERM, 1979

MICHAEL E. LAGORGA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that the denial of his pretrial motion to disqualify the district court judge is appealable as a final decision under 28 U.S.C. 1291.

1. Petitioner was indicted in the United States District Court for the Northern District of Ohio on two counts of counterfeiting, in violation of 18 U.S.C. 471, one count of making counterfeit plates, in violation of 18 U.S.C. 474, and one count of conspiracy, in violation of 18 U.S.C. 371. Thereafter, he moved under 28 U.S.C. 455 to disqualify the trial judge, United States District Judge Thomas D. Lambros. Petitioner claimed that because Judge Lambros had presided in an earlier case in which petitioner pleaded guilty, he would be a

valuable witness for petitioner's defense on the instant charges.[1] Judge Lambros denied the motion (Pet. App. B). The court of appeals held that the order was not appealable under 28 U.S.C. 1291 and dismissed the appeal (Pet. App. A).

Before sentencing in the earlier case, petitioner offered to cooperate with the Secret Service in its investigation of the counterfeiting operation that is the basis of the present indictment. Accepting petitioner's offer, a Secret Service agent and a Department of Justice attorney appeared before Judge Lambros ex parte to explain that petitioner was assisting in this investigation and to ask that his sentencing be continued until a later date. The judge granted the request. Petitioner's underlying contention is apparently that the information that Judge Lambros learned from the Secret Service agent and the Department of Justice attorney during the ex parte discussion would be useful in impeaching their anticipated testimony against him in the present case.

2. Without citing any authority, petitioner contends that the trial judge's refusal to disqualify himself was an appealable "final decision" and that the court below erred in dismissing the appeal. This claim is without merit. An order denying a motion to disqualify a judge is not reviewable on appeal until a final judgment has been entered in the case. See *United States* v. *Washington*, 573 F. 2d 1121 (9th Cir. 1978); *In re Virginia Electric and Power Co.*, 539 F. 2d 357 (4th Cir. 1976); *Scarrella* v. *Midwest Federal Savings and Loan*, 536 F. 2d 1207

[1]28 U.S.C. 455(b)(5)(iv) provides that a judge "shall disqualify himself * * * [if he] * * * [i]s to the judge's knowledge likely to be a material witness in the proceeding."

(8th Cir.), cert. denied, 429 U.S. 885 (1976); *Robinson* v. *Largent*, 419 F. 2d 1327 (3d Cir. 1969); *Rosen* v. *Sugarman*, 357 F. 2d 794 (2d Cir. 1966); *Albert* v. *United States District Court*, 283 F. 2d 61 (6th Cir. 1960), cert. denied, 365 U.S. 828 (1961); *Collier* v. *Picard*, 237 F. 2d 234 (6th Cir. 1956); see also 9 *Moore's Federal Practice* para. 110.13[10] (1975 ed.).[2]

A contrary result would be inconsistent with the "firm congressional policy against interlocutory or 'piecemeal' appeals," *Abney* v. *United States*, 431 U.S. 651, 656 (1977). "Adherence to [the] rule of finality has been particularly stringent in criminal prosecutions because 'the delays and disruptions attendant upon intermediate appeal,' which the rule is designed to avoid, 'are especially inimical to the effective and fair administration of the criminal law.'" *Id.* at 657, quoting *DiBella* v. *United States*, 369 U.S. 121, 126 (1962). See *United States* v. *MacDonald*, 435 U.S. 850 (1978). Although there are certain exceptions to the finality rule for collateral orders, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), interlocutory appeals are permitted in criminal cases only in very limited circumstances: denial of a motion to dismiss on the basis of the Speech or Debate Clause, *Helstoski* v. *Meanor*, No. 78-546 (June 18, 1979); denial of a motion to dismiss on double jeopardy grounds, *Abney* v. *United States*, *supra*; and denial of bail, *Stack* v. *Boyle*, 342 U.S. 1 (1951).

[2]This rule of nonappealability applies whether the motion for disqualification is brought under 28 U.S.C. 144 or, as here, under 28 U.S.C. 455. *In re Virginia Electric and Power Co.*, *supra*; *Scarrella* v. *Midwest Federal Savings and Loan*, *supra*; 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3553 (1975 ed).

For an order to be immediately appealable, the *Cohen* rule requires, *inter alia*, that the defendant would be irreparably harmed should trial go forward without resolution of the collateral issue; the decision must be more than merely a "step toward final disposition on the merits of the case." *Cohen* v. *Beneficial Industrial Loan Corp.*, *supra*, 337 U.S. at 546; *Abney* v. *United States*, *supra*, 431 U.S. at 658. For instance, in the case of bail, the right in question—release pending criminal proceedings—could not be vindicated by an appeal taken at the conclusion of the proceedings. And the authorization of interlocutory appeals on Double Jeopardy and Speech or Debate Clause grounds is based on the fact that those constitutional provisions protect defendants against trial itself, not simply against conviction.

Refusal of a judge to disqualify himself is an entirely different matter. It is "intertwined" with the issue of guilt or innocence which will be resolved at petitioner's trial. *United States* v. *MacDonald*, *supra*, 435 U.S. at 859, because the question whether the trial judge would, in fact, be material to petitioner's defense is "best considered only after the relevant facts have been developed at trial." *Id.* at 858. Accordingly, as in *MacDonald*, *supra*, there is no "divorce between the question of prejudice [because of the judge's refusal to disqualify himself] and the events at trial." *Id.* at 859. If convicted, petitioner may seek review of the disqualification order. And, if successful on appeal, petitioner would suffer no prejudice since on remand he would be accorded the remedy he now seeks—the availability of Judge Lambros as a potential witness. See *United States* v. *Washington*, *supra*, 573 F. 2d at 1122.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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